The learned president in his grounds of judgment quite correctly held that section 47(2) of the Arms Act applied and the presumption therefore arose against the accused in whose house the pistol and ammunition were found. Section 47(2) reads as follows:—

"Every occupier of any house or premises in which any arms, ammunition or imitation arms are found shall for the purposes of this Act be deemed, until the contrary is proved, to have been in possession of such arms, ammunition or imitation arms."

The learned president, however, convicted the accused on this presumption of possession without further proof of *mens rea*. In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case. I am fortified in this opinion by the case of *Public Prosecutor* v. *Wong Peng Wah & Ors.*[1] followed in *Toh Ah Loh and Mak Thim* v. *R.*[2]

There are other aspects of the case where the learned president has misdirected himself. On page 13 of his grounds of judgment he, in rejecting the accused's explanation held that the accused had "failed to provide any explanation as to why people should want to put him into trouble by planting the pistol in his house. He (the accused) could not even name any person who was likely to be his enemy or who had any grudge against him."

In my view the learned president has overlooked the fact that the motive for planting arms and ammunition into another man's house need not necessarily be enmity or revenge. Such motive has frequently been found to have been impelled by tempting rewards offered by the police. Under section 38 of the Arms Act even the court in case of conviction, is authorised to pay out of the fines imposed, awards to the informers.

In another passage on the same page, the learned president said that "if the pistol and the cartridge had in fact been planted there by someone who later informed the police, then he would certainly indicate the exact spot where the exhibits could be located" and the police could have easily discovered them within minutes instead of nearly one hour.

In my view this merely shows the ingenuity of the informer who knows that if the weapon alleged to have been hidden is too easily and quickly discovered by the police who goes straight to the spot, the court trying the case may feel suspicious; there may be no conviction and therefore no reward.

In the instant case, the accused has given an explanation which is consistent with his innocence and if the learned president disbelieved his explanation, he must consider whether it might reasonably be true although not convinced of its truth. He has failed to do this.

I allow this appeal. The conviction and sentences are set aside and the pistol and other exhibits are to go to the police.

Appeal allowed.

Solicitors: *Jayadeva, Zahir & Ismi.*

RICHARD YAP v. MUSTAPHA

[O.C.J. (Lee Hun Hoe J.) December 8, 1967]
[Jesselton — Election Petition No. 5 of 1967]

Election Petition — Withdrawal of — Application for — Failure by solicitor to file affidavit in compliance with Election Petition Rules, 1954, r. 21(2) — Dispensation — Discretion of election judge.

The petitioner applied for leave to withdraw the election petition taken out by him. The petitioner's solicitor did not file an affidavit in compliance with rule 21(2) of the Election Petition Rules, 1954.

Held: (1) having regard to the evidence the election judge was satisfied that no unlawful agreement or undertaking had been entered into in relation to the withdrawal and leave was accordingly granted to the petitioner to withdraw his petition;

(2) in view of the peculiar circumstances of the case the affidavit of the petitioner's solicitor was dispensed with under the proviso to rule 21(2) of the Election Petition Rules, 1954.

Per Curiam: An election petition can only be withdrawn with the leave of the judge. It is important for the judge to exercise his discretion with great care. Such leave will only be granted if he is satisfied that no unlawful agreement or undertaking has been entered into in relation to the withdrawal.

Cases referred to:—

(1) *Hartlepool Election Petition* (1869), 19 L.T. 821 & 822.

(2) *County of Durham (North Division) Election Petition* (1874), 31 L.T. 321.

ELECTION PETITION.

Petitioner in person.

Dato' Eusoffe Abdoolcader (*W. K. Loo* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: This is an application for leave to withdraw an election petition. It is common knowledge that the first direct election to the State Legislative Assembly was held on various dates in April, 1967. The result of the election was published in the *Gazette* on 10th May, 1967. The petitioner Richard Yap and the respondent, Tun Mustapha, were both candidates

for the Bengkokka-Benggi constituency and the latter was duly elected. This is the second petition between the parties. The first one was dismissed together with two other petitions mainly on the ground that the petitions were not served within time.

Section 23 of the Election Offences Ordinance, 1954, provides that within thirty-one days after the date of publication of the result of an election in the *Gazette* every candidate must deposit with the proper officer a true return respecting his election expenses. It is the duty of a candidate or his agent to comply with the above provision failing which such person shall be guilty of an illegal practice unless excused in the appropriate manner.

The respondent deposited his return on 9th June, 1967. The State Supervisor of Elections published the returns he had received in the *Gazette* of 6th July, 1967. On 20th July, 1967 the petitioner filed his second petition through his advocate against the respondent questioning his return of election expenses.

This petition was originally fixed for hearing on 23rd October, 1967. Unfortunately before that date the State Government, following a request of the advocates in the State, issued with undue haste certain direction, before the advocates could clarify certain point, which resulted in the total ban of certain category of practitioners from appearing in the courts. This, if I may say so, with respect, is an attempt to hinder the operation of certain provisions of the Advocates Ordinance. I hope it is unintentional and due to a misunderstanding of the working of the said Ordinance. It is regrettable because it will deprive the public generally (including the Government) of the services of eminent practitioners and the advocates of the State particularly of the great benefit to be gained from the appearance of such practitioners in cases involving difficult and controversial points of law. The result is that Dato' Marshall was unable to appear for the petitioner on the day of the hearing. Dato' S. P. Seenivasagam and his brother Mr. D. R. Seenivasagam took over from Dato' Marshall but were in no position to proceed with the hearing as they had not enough time to study the papers and consider points of law involved. In such circumstances the hearing was adjourned to 29th November, 1967.

On the eve of the hearing petitioner indicated to Mr. Chong Thain Vun his wish to withdraw his petition. Just before the hearing he filed his application supported by his affidavit for the withdrawal of his petition. Dato' S. P. Seenivasagam took exception to the fact that the petitioner decided to withdraw the petition without consulting him and his colleagues and asked that they be discharged which the petitioner acceded in writing. The petitioner appeared at the hearing in person.

The grounds which the petitioner sought to withdraw his petition are:—

(1) that in the interest of all concerned he wishes to adopt a policy of allowing bygones be bygones.

(2) that in withdrawing the petition he may pave the way for a better political climate for all political parties to work together for the good of the State of Sabah.

An election contest is a peculiarly and purely statutory proceeding unknown to the common law. For this reason the statutory requirements of election law must be strictly observed. The purity of the election process must be properly safeguarded and it must manifestly and undoubtedly be seen that the people are not elected by flagrant breaches of the law or corrupt practices.

In this petition very serious allegations of illegal practice are made. In order to prevent unscrupulous practice for the hushing up of scandalous matters which should be brought into the open in the public interest the law has therefore made it difficult for withdrawal of petitions. Thus, Blackburn J. said in *Hartlepool Election Petition* [1] that the withdrawal of a petition

> "might in some cases very well be the means of cloaking or concealing an attempt to stifle an inquiry where an inquiry ought really to be made."

And Grove J. observed in *County of Durham (North Division) Election Petition* [2] as follows:—

> "The withdrawing of an election petition must be by leave of the judge, and if the judge saw that the withdrawal was the result of any compromise, of any giving and taking so as to prevent evidence being brought forward, not in the interest of either of the parties, but in the interest of the constituency, and of the purity of election, the judge ought not to allow a petition to be withdrawn; he ought as far he would have power to do so, to insist upon the petition being proceeded with."

Under rule 21 of the Election Petition Rules, 1954, a petition can only be withdrawn with the leave of the judge. It is important for the judge to exercise his discretion with great care. Such leave will only be granted if he is satisfied that no unlawful agreement or undertaking has been entered into in relation to the withdrawal. The procedure for withdrawal of a petition is prescribed by the said Rules, particularly, rules 22 to 26. Rule 22 prescribes the form to be used for the application for leave to withdraw a petition. Under rule 23 a petitioner must give a copy of such application to the respondent and a notice published forthwith in the *Gazette*. The publication of such notice is to enable any person qualified under section 34 of the Election Offences Ordinance, 1954, to come in. Thus rule 24 provides that any such person may apply to be substituted for the petitioner and rule 26 gives the judge a discretion whether to allow such substitution or not.

It was mentioned to me previously that petitioner had no election agent. But going through the *Gazette* of 6th July 1967 I note that the name of the petitioner's election agent was named in the returns published. The petitioner produced a letter he wrote to the Returning Officer, Kudat, advising him that his election agent had declined to act as such and had not in fact acted for him. An affidavit from the Acting State Supervisor of Elections now shows that a mistake has been made to the insertion of the name of the election agent. I am satisfied that petitioner did not in fact have an election agent.

All the parties to the petition except Mr. Chong Thain Vun have filed their affidavits. In view of the peculiar circumstances of the case and in pursuance of the proviso to rule 21(2) of the Election Petition Rules, 1954, I would dispense with his affidavit.

I have been told of the political undercurrent existing in the State and of the fact that the petitioner was more or less under party pressure to file his petition. All these may be true but I must make it quite clear that I am not in the least interested in those matters. I am concerned only with the law. I have to decide whether on the evidence before me I should grant leave for the withdrawal of the petition. Having regards to the evidence I am satisfied that no unlawful agreement or undertaking has been entered into in relation to the withdrawal. I therefore grant leave to the petitioner to withdraw his petition. I will now hear parties on question of costs.

Leave to withdraw petition granted.

[*Note:* After hearing parties on the question of costs, the respondent was awarded costs to be taxed on the higher scale and the security lodged to be applied in payment of taxed costs and to be paid out to the respondent. *Ed.* M.L.J.].

MIRANDA v. KHOO YEW BOON

[F.C. (Azmi C.J. (Malaya), Ismail Khan and Gill JJ.) December 12, 1967]

[K.L. — Federal Court Civil Appeal No. X. of 1967]

Advocates and Solicitors — Professional negligence — Liability for negligence in a fused profession — Failure to file memorandum of appeal in time — Not remedied by unsuccessful application to extend time — Retainer not affected by client's failure to pay due instalment of fees — Appeal against exercise of discretion — Guiding principles — Burden of proof as to damages — Immaterial whether negligence act that of barrister or solicitor — Advocates and Solicitors Ordinance, 1947, ss. 2, 59, 60 & 63.

Practice and Procedure — Non-compliance with Rules of court — Application for extension of time refused — R.S.C. 1957, O. 58 r. 22 as amended by the Supreme Court (Amendment) Rules, 1960, r. 5(3).

Practice and Procedure — Jurisdiction — Discretion — Review of discretion of court — Principle upon which the court will act.

This was an appeal by an advocate and solicitor, *M*, against whom judgment had been given in an action for negligence by his former client, *K*, in the High Court at Muar, Johore.

The action for negligence arose out of a civil action in the Sessions Court in which *K* had retained *M* as his advocate and solicitor. *K* failed in his defence to this action and had instructed *M* to appeal. The notice of appeal was filed within the prescribed time but the memorandum was not. *M* then made an unsuccessful application for extention of time relying upon his clerk's ignorance of a change in the relevant rule.

Ac action for negligence against *M* founded on the failure to file the memorandum in time succeeded, the trial judge finding that this failure clearly constituted a breach of duty to exercise proper care. Damages of $2,534 were awarded to *K*. In his appeal it was argued for *M*, *inter alia*, that as he was an officer of the court public policy required that he should be protected from suits brought by disgruntled litigants. In dismissing the appeal, the court made observations on the liability of an advocate and solicitor in a fused profession and:

Held: (1) an advocate and solicitor is under a contractual duty to use care and this extends to the conduct of a cause;

(2) the position of an advocate and solicitor is exactly the same as that of a solicitor in England and if there is an act of negligence it is immaterial to consider whether the act is one normally done in England by a barrister or a solicitor;

(3) in an action against a solicitor for negligence in litigation the burden is on the solicitor to show that the client was not damnified;

(4) on the facts of the action before the sess ons court *K* would in all probability have succeeded in his appeal had it been prosecuted and therefore the damages awarded against *M* were proper.

(5) having accepted instructions to and having filed the notice of appeal it was not open to *M* to argue that there was no solicitor and client relationship because *K* had failed to pay *M* a due instalment in his fees;

(6) the unsuccessful application for extension of time did not remedy the omission to file the memorandum in proper time;

(7) to succeed in an appeal against the exercise of discretionary jurisdiction, the appellant must show that the discretion was exercised on a wrong principle so that there has been a miscarriage of justice. This, the appellant failed to do;

(8) while a solicitor is not expected to know every statute, there are statutes some which it is his duty to know.

Observations on burden of proof as to damages.

Cases referred to:—

(1) *Hendry* v. *de Cruz* [1949] M.L.J. Supp. 24, C.A.

(2) *Fletcher & Son* v. *Jubb, Booth & Helliwell* [1920] 1 K.B. 274; 89 L.J.K.B. 236; 122 L.T. 258; 36 T.L.R. 19.

(3) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228, P.C.

(4) *Rondel* v. *Worsley* [1967] 1 Q.B. 443 at 504; [1966] 3 W.L.R. 950 at 964; [1966] 3 All E.R. 657 at 666*.

(5) *Godefroy* v. *Jay* (1831), 7 Bing. 413.

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* On appeal to the House of Lords, see [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993. The appeal was also dismissed. *Ed.* M.L.J.